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ALEXANDER L. STEVAS
CLERK

(9)

No. 83-1911

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHRISTOPHER L. LOWE, ET AL.,
Petitioners,

VS.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS AMICUS CURIAE

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December, 1984

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CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,
Petitioners,

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SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS AMICUS CURIAE

This Brief Amicus Curiae in support of the position of the Respondent is filed with the consent of all parties[1], as provided in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The North American Securities Administrators Association, Inc. (NASAA) is an international organization whose membership includes the securities administrators of the fifty states, the District of Columbia, Puerto Rico, Mexico and the nine Canadian provinces and territories.

1 Letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

The interest of NASAA in the present case arises from the fact that all fifty-three of its American members are charged with the enforcement of the securities laws of the various states. Presently, thirty-six of these state statutes regulate investment advisers. The state statutes work along side and supplement the federal regulatory pattern established by the Investment Adviser Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (1948) ["the Act"]. However, in many respects, the state regulatory scheme is often more stringent than the federal one—as will be outlined in more detail, *infra*.

Most of the state statutory programs are based on the Uniform Securities Act. In turn, this Act, which was drafted in 1957, drew heavily upon the earlier Investment Adviser Act. As a result, the language of both acts is similar or identical in many instances. This is particularly true of the sections which are the focus of the present litigation.

The definition of "investment adviser" found in § 202 (a) (11) of the Act, 15 U.S.C. § 80b-2 (a) (11) (1984) and the registration requirement found in § 203 (a) of the federal Act, 15 U.S.C. § 80b-3 (a) (1984) are also found with only minor changes in the Uniform Securities Act. *See:* Uniform Securities Act, §§ 201 (c) and 401 (f) (1957). Section 408 of the Uniform Securities Act, like § 209 (e) of the federal Act, 15 U.S.C. § 80b-9 (e) (1984), authorizes state administrators to seek injunctive relief against further violations of the state statutes.

Therefore, any one of the thirty-six member states could have brought a similar injunctive action as did the S.E.C. in this instant case.

Because of the nature of their enforcement role and the close similarity of the statutes in the present case and those which NASAA members enforce, the case at bar will have a heavy impact upon the NASAA membership and their continued ability to enforce effectively their state statutes. Therefore, in a very real sense, NASAA and its members have an interest in the outcome of the present litigation.

SUMMARY OF ARGUMENT

The Securities and Exchange Commission (S.E.C.) seeks to enjoin petitioner Christopher L. Lowe and his enterprises "from engaging in the business of advising others, directly or through publications or writings, as to the value of securities or as to . . . investing in, purchasing or selling securities." S.E.C. Complaint [JA23]. The injunction would enforce the S.E.C.'s decision to revoke petitioner Lowe Management Corporation's registration and to bar Lowe from associating with any investment adviser.

The revocation and bar was justified because Lowe's conduct "reflect[ed] a callous disregard" for the principle that "an investment adviser is a fiduciary whose actions must be governed by the highest standards." *In re Lowe Management Corp.*, S.E.C. Investment Adviser Act of 1940 Release No. 759 (May 11, 1981) [JA71]. Specifically, Lowe had been convicted of several serious offenses:

(i) Lowe was convicted of misdemeanors for making false representations to a client that $2,200 had been invested and a 27% return earned, when in fact Lowe had misappropriated the funds for his own use.

(ii) Lowe was also convicted of tampering with physical evidence, a felony. He altered a copy of a $10 money order to make it appear that the order was for $10,000.

(iii) Lowe pleaded guilty to third degree larceny, also a felony, for fraudulently drawing checks on an account to which worthless checks had been deposited.[2]

Lowe did not seek judicial review of the S.E.C.'s order of revocation, which concluded:

> Lowe's various actions clearly demonstrate his total lack of fitness to remain in "an occupation which can cause havoc unless engaged in by those with appropriate background and standards." [*Marketlines, Inc.* v. *S.E.C.*, 384 F.2d 264, 267 (2d Cir.) *cert. denied*, 390 U.S. 947 (1968)] . . . .
>
> Although we recognize the serious effect of the sanctions which [are] imposed, *we are convinced that lesser remedies will not suffice* . . . . In evaluating the public interest requirements in this case, we have taken into account [Lowe's] statement that [he and his enterprises] are now solely engaged in the business of publishing advisory publications . . . . [A]s the law judge noted, even [his] present activities afford numerous "opportunities for dishonesty and self-dealing."

[JA71] [Emphasis added]

The proposed injunction would only enforce the revocation decision. It does not violate this nation's "profound commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York*

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[2] Since the S.E.C. revocation, Lowe pleaded guilty to two New Jersey charges of theft by deception, for which he was given a three year prison term and probation.

Times v. *Sullivan*, 376 U.S. 254, 270 (1964). The injunction does not remotely threaten interference with a meaningful dialogue of ideas concerning self-government. *Id.* at 269-70. The injunction is not even primarily designed to restrict the flow of truthful information respecting commerce, like bans or restrictions on advertising. *See, e.g., Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas* v. *Public Service Commission*, 447 U.S. 557 (1980). This case is not an appropriate occasion for extraordinary judicial intervention against policies adopted by majoritarian political processes. Despite petitioners' allegations that an injunction would abridge the freedom of the press, the central purposes of the First Amendment are not implicated in this case.

First Amendment cases often require a careful sensitive calculation of what issues are, and what issues are not, at stake. *Cohen* v. *California*, 403 U.S. 15, 18 (1971). This Court must consider, first and foremost, whether expressive freedoms are really endangered in this case—or whether this case involves only a simple application of a general regulatory statute not designed to suppress expressive liberty.

The First Amendment is no absolute and comprehensive guarantee against all forms of government regulation that happen to touch an individual's speech or publication. Consistently, this Court has held that:

> [W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

United States v. *O'Brien*, 391 U.S. 367, 376 (1968). This approach to this type of First Amendment problem is essential, if the government's power to regulate economic and social activity is to be preserved. As stated by the Court in *Konigsburg* v. *State Bar of California*, 366 U.S. 36, 50-51 (1961):

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

The Court accommodates its commitment to enforcing general regulatory statutes with the need to give a careful scrutiny to excessive limits on expressive liberty. Compare *United States* v. *O'Brien*, 391 U.S. at 376-77 with *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980).

In this case, the injunction is not excessive. A careful scrutiny of competing interests should reveal that the proposed injunction merely effectuates the regulation mandated by the Investment Adviser Act of 1940, 15 U.S.C. §§ 80b-1 *et. seq.* ("the Act"). Lesser remedies will not suffice to achieve the purposes of the Act: First, to mandate the highest ethical standards in the investment adviser profession, *and*, second, to ensure that those, like Lowe, who do not live up to their fiduciary duties no longer give any form of investment advice.

ARGUMENT

I

THE PROVISIONS OF THE INVESTMENT ADVISERS ACT AND PARALLEL STATE REGULATION PROMOTE SUBSTANTIAL GOVERNMENTAL INTERESTS NOT RELATED TO SUPPRESSION OF EXPRESSIVE LIBERTY.

A. Federal and state laws are designed to ensure that the investment adviser profession is governed by the highest standards of ethics.

As this Court held in *Securities and Exchange Commission* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963), the Investment Adviser Act was part of a national effort to regulate the securities industry in order to avoid abuses that contributed to the stock market crash of 1929 and the depression of the 1930's. 375 U.S. at 186.

> A fundamental purpose, common to [federal securities] statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry. . . . 'It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry.

Id., at 186, quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963).

The substantial governmental interests underlying the Investment Advisers Act are illustrated by the facts of the *Capital Gains Research Bureau* case. A registered investment adviser purchased securities; then, he recommended them to his clients in a newsletter. Finally, he sold the same securities after the rise in the market price following

his recommendation. This "scalping" violated the canon that investment advisers "should . . . occupy an impartial and disinterested position, as free as humanly possible from the subtle influence of prejudice, conscious or unconscious." 375 U.S. at 188, quoting Investment Trust and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory and Investment Advisory Services, HR Doc. No. 477,76th Cong., 2d Sess. 1, at 66-67.

The decision in *Capital Gains Research Bureau* reflects the purposes of the Investment Adviser Act: First, the motivating "congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship' "; Second, the "congressional intent to eliminate, or at least to expose, all conflicts of interest." 375 U.S. at 191.[3] To promote the

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[3] The case at bar also implicates the interests of the states, who continue to administer parallel regulations respecting investment advisers. Although, most regulation of securities is today the responsibility of the federal government, the substantial state efforts must not be ignored. Indeed, the first securities laws were adopted by the states, beginning in the states had some form of securities act. L. Loss and E. Cowett, *Blue Sky Law*, 3-10, 17-18 (1958). Though these regulations had been ineffective in preventing the events precipitating the Great Depression, the state strategies supplement the federal securities laws. J. Long, *1985 Blue Sky Law Handbook: Developments in State Securities Regulation*, § 1.03.

In recent decades, state regulation of investment advisers has increased. As noted above, presently thirty-six of the fifty-three American state jurisdictions imposed some form of regulation on investment advisers. Most of the state regulatory schemes are based on the Uniform Securities Act. [The significant provisions of this statute dealing with

Act's objectives, Congress enacted a registration requirement and vested investigatory, prosecutorial and regulatory powers in the S.E.C.

B. The power to revoke an adviser's registration is a necessary sanction to protect the investing public. Revocation ensures that those who do not comply with the highest ethical standards are not advisers. Moreover, the prospect of future revocation of registration encourages present compliance by those who are registered.

The functions of the S.E.C.'s powers under § 203(e) of the Act are manifest. The S.E.C. may censure an investment adviser, or it may suspend and revoke his registration if the adviser or any person associated with the adviser has been convicted within ten years of certain felonies or mis-

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[3] (Continued)

investment adviser regulation are reproduced as Appendix A to this brief.] Section 401(f) defines "investment adviser" in virtually the same way as does § 202(a)(11) of the Investment Advisers Act, 15 U.S.C. § 80b-2(a)(11)(1984).

Beyond this, § 102 of the Uniform Act prohibits the giving of fraudulent investment advice, places certain restrictions on investment advisory contracts, and grants the Administrator authority to limit the ability of investment advisers to hold customer funds. Section 201(c) requires the registration of investment advisers, while § 202(b) allows the imposition of a registration fee. Presently, thirty-six states require such registration and impose a fee. 2 H. Sowards & N. Hirsch, *Blue Sky Regulation* § 8.01 (1983)(11C—Part 2 Business Organizations, Matthew Bender). Sections 202(d) and (e) allow the Administrator to impose minimum capital and surety bonding requirements on investment advisers. Fifteen states have exercised this authority and imposed such minimum capital requirements, while thirteen states have adopted bonding requirements. *Id.*, § 8.05[2]. Sections 203(a) and (b) allow the Administrator to impose record-keeping and financial reporting requirements on investment advisers. Fourteen

demeanors. Congress specifically provided for revocation of a registered adviser who has been convicted of (i) any crime that "involves . . . the making of a false report . . . [or] perjury," or (ii) any crime that "involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities." In short, for crimes such as those committed by Lowe, anyone may be—and should be—prevented from continuing business as an investment adviser.

The S.E.C.'s power to stop an investment adviser from continuing business serves at least two functions: First, to protect the public from continuing abuses and crimes by the adviser; *and* second, to provide a sanction that would deter registered advisers from committing these and other violations of law. In short, the Act, like many laws regulating professions, presumes that the prospect of future

[3](Continued)

states have adopted record-keeping requirements, while only thirteen states have imposed financial reporting requirements. *Id.*, §§ 8.07-8.08. Finally, § 204(b)(6) of the Uniform Securities Act allows the Administrator to test investment advisers for professional competence before registering them. Presently, twenty-three states are requiring investment advisers to pass some form of test before registration is granted. Many of the above regulatory features such as minimum capital requirements, bonding and professional competency testing find no counterparts in the Investment Adviser Act.

Finally, § 204(a) sets out grounds for denial, suspension, or revocation of an investment adviser's registration. The more important grounds are: (i) Conviction within the last ten years of any misdemeanor involving a security or any aspect of the securities business or any felony (§ 204(a)(2)(C)); (ii) Having been enjoined by any court from engaging in or continuing any conduct or practice involving any aspect of the securities business (§ 204(a)(2)(D)); (iii) having had

revocation will encourage present compliance. Most important, this second function—that of deterring violations by currently registered advisers—is *independent* of any expectation that an individual whose registration is revoked will repeat acts of misconduct.

The S.E.C. must focus its concern not only on potential abuse and deception in Lowe's future publications. It must also ensure that revocation is real. Lowe apparently wishes to "keep his foot in the door," perpetuating his relationship with past clients—albeit through the medium of a newsletter. Despite the clear purpose of revocation—to stop the business of a wrongdoer—Lowe preserves "the good will" of his on-going business concern as a investment adviser. In effect, if not deliberately, he circumvents the decision to revoke his license by transforming his business—at least in name—from investment adviser to "publisher."

[3](Continued)

his registration revoked by the S.E.C. or any state securities agency; or (iv) having engaged in dishonest or unethical practices in the securities business (§ 204(a)(2)(G)).

NASAA is presently attempting to implement this last extremely important ground for disciplinary action by the adoption of a professional standard of conduct for investment advisers. *See:* NASAA, Proposed Statement of Policy, "Unethical Business Practices for Investment Advisory Firms," 1 Blue Sky L. Rep. (CCH) ¶ 5343 (1983) [Appendix B to this Brief.] When completed, this Statement of Policy will be recommended to the NASAA member states for their adoption on an individual state-by-state basis.

It should be apparent that any of the thirty-six state jurisdictions could have revoked or denied Petitioner's registration based upon Lowe's conviction for numerous felonies and misdemeanors involving the securities business, as well as the S.E.C.'s revocation of registration and the injunction in the present action.

A statute—and many similar regulations of professions—can constitutionally impose a sanction, a punishment, a legally defined consequence for specified violations of law. The Fifth and Amendments explicitly specify that an individual *can* be deprived of life, liberty *and* property with due process of law. A member of a regulated profession can be prevented from continuing business in that profession after proof of wrongdoing.

II

THE CONSTITUTIONALLY-JUSTIFIED SUSPICION OF PRIOR RESTRAINTS AGAINST EXPRESSIVE ACTIVITY DOES NOT EXTEND TO ALL FORMS OF INJUNCTIVE RELIEF THAT TOUCH ON SPEECH OR EXPRESSION AS AN INCIDENTAL PART OF OTHERWISE UNLAWFUL CONDUCT.

The First Amendment does not ban all injunctions that involve expressive activity by requiring that they be labeled "prior restraints." As the cases discussed *infra* illustrate, courts may enjoin a pattern of conduct violating a general regulatory statute not designed to suppress expressive activity. This is so even though the enjoined conduct may involve expressive activity and an injunction might, therefore, be caricatured as "prior restraint" or "censorship."

> The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. [There is a] duty of closer analysis and critical judgment in applying the thought behind the phrase . . . "What is needed," writes Professor Paul A. Freund, "is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particularistic analysis." The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539.

Kingsley Books, Inc. v. *Brown*, 354 U.S. 436 (1957).

Again, this Court must remember what is not at issue in this case. Fundamental principles of constitutional law prohibiting censorship are not at stake. There is no question that suspicion of prior restraints is the first principle of the First Amendment. *Near* v. *Minnesota*, 283 U.S. 697 (1931); L.W. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* (1960). Prior restraints involve special dangers: They can "stifle the immediacy of speech." A.M. Bickel, *The Morality of Consent* 61 (1975). This Court should not adopt a vague and uncertain balancing test to replace its customary and justified suspicion of true censorship.

Nevertheless, this Court must look to see if the government seeks to stifle expressive activity, or if the government merely seeks to enjoin illegal conduct involving some expression. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *pire Storage Co.*, 336 U.S. 490, 498 (1949).

Cases involving some of the most important federal regulatory programs illustrate these principles. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), this Court held that no antitrust liability can be premised on legitimate efforts to petition government. The *Noerr-Pennington* doctrine was designed to ensure that federal courts did not punish activities which

were, first, "essentially dissimilar" from activities "traditionally condemned" by the Sherman Act, and, second, an exercise of political freedoms. *Noerr Motor Freight*, 365 U.S. at 136-37.

However, the Court also stated that it would not tolerate wrongdoing camouflaged as political activity. "There may be situations in which a publicity campaign ostensibly directed toward influencing governmental action is a mere sham to cover what is nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." *Id.* at 144.

This limiting principle was given effect in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Plaintiffs had sought injunctive and compensatory relief against an alleged scheme to abuse government processes in order to interfere directly with competition. According to the complaint, the defendants had tried to deny competitors "meaningful access to adjudicatory tribunals" by initiating baseless claims and proceedings. In a unanimous decision holding that the plaintiffs had stated a cause of action under the Sherman Act, the Court used strong language reminiscent of *Giboney*:

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute . . . First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' . . . which the legislature has the power to control. . . . If the end result is unlawful, it matters not that the means used in violation may be lawful.

California Motor Transport, 404 U.S. at 514-15.

A historic case from the labor relations field illustrates the propriety of an injunction that has incidental effects on expressive activity. In *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), the Supreme Court held that federal courts could enjoin unions and union officials from leading strikes over arbitrable disputes, when such strikes violated a no-strike covenant in a collective bargaining agreement. A union's vulnerability to a *Boys Markets* injunction and other relief often turns on the union's responsibility for so-called "wildcat" strikes. *Cf., United States* v. *International Union, Mine Workers of America*, 77 F. Supp. 563 (D.C. 1948) ("nods," "winks," and "codes" as evidence of union leadership); *Carbon Fuel* v. *Mine Workers*, 586 F.2d 1346 (4th Cir. 1978), *aff'd.* 444 U.S. 212 (1979). Moreover, it requires little imagination to see that the efficacy of a *Boys Markets* injunction depends, in part, on "stifl[ing] the immediacy" of union leaders' expressions of support for an illegal strike—whether the leaders' expressions are "personal," "impersonal," in public union meetings, in newsletters, on radio and television or by way of "nods," "winks," and "codes." In such cases, federal injunctions promote the basic objectives of the National Labor Relations Act: Encouraging collective bargaining by enforcing arbitration agreements and no-strike pledges. *Boys Markets* v. *Retail Clerks Union*, 398 U.S. at 247-49. These are good reasons that the violators of these so-called prior restraints ought to be assured of being held in contempt for disregarding the injunctions.

Finally, injunctions can serve governmental interests in the fight against race or gender discrimination. In *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S.

376 (1973), this Court upheld a local order prohibiting a newspaper from listing job advertisements in sex-designated help-wanted columns. The order enforced a local ordinance against employment discrimination. Addressing the issues posed by injunctions in such cases, Professor Alexander Bickel noted:

> Neither is the right to publish absolute; nothing is . . . Newspapers have, for example, been enjoined, under the Civil Rights Act of 1968, from printing advertisements for the sale of real estate to whites only; here governmental action is exerted to attain the government's objective not only by action against the seller, but by pursuit of the publisher. The publisher is said to have a commercial interest in such cases, but he always has, and political opinion is not irrelevant to publication of racially discriminatory advertisements
>
> . . .

A.M. Bickel, *The Morality of Consent* 86 (1975). In such cases, the government pursues its substantial interest in eliminating the "men only" or "whites only" signs of employers or property owners—not because it wishes to censor, silence or stifle debate—but because it wishes to enforce equal opportunity in the marketplace. It does so, first by restrictions on what a seller or employer may include in its "offer" for a contract of sale or employment. It also supplements this regulation by saying that the seller and employer cannot advertise what they cannot do. Still, all this is "prior restraint," but not the type that the First Amendment prohibits.

III

THE ACT'S EXEMPTION FOR "BONA FIDE NEWSPAPERS OR FINANCIAL PUBLICATIONS" DOES NOT DEPRIVE THE PETITIONERS OF EQUAL PROTECTION OF THE LAWS.

The principle that all are entitled to the equal protection of the laws directs only that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920), quoted in *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). However, neither the Fifth Amendment nor the Fourteenth Amendment "require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940), also quoted in *Plyler*, 457 U.S. at 216 [Emphasis added]. On the federal level, "the initial discretion to determine what is 'different' and what is 'the same' resides" in Congress, which

> must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on [government's] practical ability to remedy every ill.

Id. at 216 (addressing equal protection principles applied to the states).

In this context, Lowe's challenge to the Act's classification scheme—which exempts banks, lawyers, and others, as well as bona fide newspapers and publications—is reminiscent of *Morey* v. *Doud*, 354 U.S. 457 (1957). In that case, Illinois had expressly exempted American Express from the operation of stringent financial requirements for firms

engaged in the money order business. In *Morey*, the Supreme Court struck down this exemption in Illinois' exclusively economic regulation as irrational. However, the case was overruled expressly in *New Orleans* v. *Duke*, 427 U.S. 297 (1976), which reaffirmed the initial discretion of political institutions to distinguish what is "the same" and what is "different." Even though Lowe plainly relies on the presence of First Amendment issues to challenge the Act's classifications in this case, the implications of the petitioners' analysis leads to the odd and inflexible notion that Congress could exempt banks, lawyers, accountants, engineers and others, but it cannot distinguish between bona fide newspapers not primarily engaged in investment advice from other publications whose raison d'etre is investment advice.

An alternative possibility is that Congress can establish no classifications because of the presence of these First Amendment issues. However, this does not appear to be Lowe's point. Instead, petitioners disregard the lessons of many recent cases which have refused to create a First Amendment privilege against the operation of general regulatory statutes. Indeed, the petitioners argue for just such a privilege so that the Act's classifications might be revised just enough to immunize Lowe's continuing investment advice business.

A. The task of classifying between investment advisers within the scope of the Act and bona fide publications is a factual inquiry. This Court should not declare the Act's classification to be unconstitutional merely because of an unwarranted lack of confidence in the S.E.C.'s capacity for assessing facts.

Congress limited the scope of the duty to register (as opposed to the anti-fraud provisions of securities laws) by exempting certain entities not primarily engaged in the business of giving investment advice—such as banks and lawyers. Congress also sought to reduce tension between its regulatory scheme and First Amendment values by recognizing that the registration provisions should not apply to another class of institutions, who also are not engaged primarily in the investment advice business—bona fide newspapers and financial publications.

In *S.E.C.* v. *Wall Street Transcript*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970), the court of appeals approved the essence of the S.E.C.'s factual approach to distinguishing between investment advisers and bona fide newspapers and financial publications.

> Section 202(a)(11) of the Act list a number of examples of persons or entities whose activities might fall within the broad definition of 'investment adviser' but *whose customary practices would not place them in the special, otherwise unregulated, fiduciary role for which the law established standards* . . . The phrase "bona fide" newspapers, *in the context of this list*, means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred. The determination of whether or not a given publication fits

> within this exclusion must depend on *the nature of its practices* rather than upon the purely formal 'indicia' of a newspaper . . .

422 F.2d at 1376-77 [Emphasis added]. *See, also, e.g.: S.E.C.* v. *Suter,* 732 F.2d 1294 (7th Cir. 1984); *S.E.C.* v. *Wall Street Publishing Institute, Inc.,* 591 F.Supp. 1070 (D.D.C. 1984) (application of "nature of practices" test to defendant's Stock Market Magazine); "Applicability of Investment Advisers Act to Certain Publications," 42 Fed. Reg. 2953 (1977), 17 C.F.R. § 276.

The primary test established by these cases is the publication's raison d'etre: Is the publication designed primarily for the giving of investment advice, or is the scope of the publication's reason for being different, broader or only incidentally related to matters that might be categorized as "investment advice?" This test can only be formulated in general terms—and it is necessarily factual in character. It is not free from difficulty, as Judge Brieant, dissenting in the Court of Appeals, pointed out. *S.E.C.* v. *Lowe,* 725 F.2d 892, 908 (2d Cir. 1984). However, many laws, statutes and regulations involve difficult factual issues.

When a publication is, arguably, a mere pretext for the operation of a continuing investment advice business, proof of the "publisher's" subjective motive or intent should be considered, along with objective evidence of the nature of the publication's activity. *S.E.C.* v. *Wall Street Transcript Corp.,* 422 F.2d at 1377-78. The nature of the "publisher's" activity would be pertinent to the assessment of the publication's reason for being. *See also, e.g., S.E.C.* v. *Wall Street Publishing Institute, Inc.,* 591 F.Supp. 1070, 1077-81 (D.D.C. 1984).

Only by focusing on the nature of the practices to be regulated—investment advice—and carefully sifting all available evidence to consider the primary purpose and nature of the activity, can an agency or court effectively accommodate the competing regulatory and constitutional interests.

B. The petitioners' suggested classification scheme—distinguishing between "personal" and "impersonal" advice—is no easier to administer than the S.E.C.'s test based on the nature of the alleged adviser's practices.

The factual and administrative difficulties of applying statutory classifications are not avoided by changing the focus of the Act from (i) the differences among publications to (ii) a distinction between "impersonal" and "personal" advice. Moreover, the latter test is not the classification of Congress.

First, the difficulties inherent in the "personal-impersonal" standard are evidenced by the rulings of the District Court . *S.E.C.* v. *Lowe,* 556 F.Supp. 1359 (S.D.N.Y. 1983). "Publication" is impersonal—and therefore beyond the scope of the Act as interpreted by Judge Weinstein. *Id.* at 1365. A tape recorded "hot-line" in which a call is initiated by a subscriber is "personal," although the adviser makes no "tailor-made" recommendations. *Id.* at 1371.

Consider a third possibility—"broadcast": an investment adviser whose registration has been revoked secures a position as host on a radio talk show. He specializes in the discussion of the stock market and the American economy. The adviser advertises his show in his newsletter. The adviser listens to and answers questions by his many

listeners, who include—of course—his clientele. Is this protected First Amendment activity that is "impersonal?" Or is this unprotected investment advice that is "personal" because it "creates dangers of personal advice?" 556 F.Supp. at 1371. (Suppose the adviser also delivers a stirring rendition of selections from Areopagitica? *S.E.C.* v. *Lowe*, 725 F.2d at 908 [Brieant, J., dissenting]) The distinction between "personal" advice and "impersonal" advice is not irrelevant. However, neither the petitioners, their amici, nor the District Court demonstrate why the "personal"-"impersonal" formulation should be the exclusive test. As these examples suggest, it is no guide to determining when First Amendment interests are paramount or absent. And contrary to the petitioner's apparent suggestions, the "personal"-"impersonal" test is no index to when a relationship of trust and confidence exists—and might be subject to abuse, as the *Capital Gains Research Bureau* decision amply demonstrates.

The S.E.C. and the courts cannot find a true escape from assessing all facts and circumstances—unless the Court takes a drastic step proposed by no one, yet, and holds that the giving of investment advice privately or publicly, personally or impersonally, is protected activity under the First Amendment. A careful assessment of Lowe's logic shows that future litigants in future cases may allege that giving investment advice is beyond government's power to enjoin —no matter what medium is utilized to deliver the message. *Cf., Greenmoss Builders, Inc.* v. *Dun & Bradstreet, Inc.*, 461 A.2d 414 (Vt. 1983), *cert. granted*, ... U.S. ....., 104 S.Ct. 389 (1983).

C. The logic of the petitioner's equal protection argument leads to excessively broad constitutional privileges for alleged press enterprises from general regulatory statutes.

The press enjoys no special immunity from the operation of general regulatory statutes. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (1967). This has been the consistent lesson of numerous decisions of this Court. Businesses which happen to be engaged in expressive activity are not immune from antitrust laws, *Associated Press* v. *United States*, 326 U.S. 1 (1945), or the labor relations statutes, *Associated Press* v. *N.L.R.B.*, 301 U.S. 103 (1945). Journalists lack special privileges of access to correctional facilities. *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Saxbe* v. *Washington Post*, 417 U.S. 817 (1974); *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978). Journalists with information relevant to criminal investigations may not resist a subpoena of a grand jury on the ground of some generalized newsman's privilege. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Newspapers are subject to ordinary searches under a valid warrant. *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). These and other familiar decisions demonstrate the "clear message [that] attempts to find a special protection for the institutional press within the Speech and Press Clauses of the First Amendment will not succeed." M. A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 Sup. Ct. Rev. 225 (1978).

Despite this clear message, Lowe's logic is that all individuals purporting to exercise First Amendment rights enjoy an expansive privilege against general regulations. Indeed, in *Branzsburg*, this Court has foreseen exactly this

problem of distinguishing who is entitled to the protections of a generalized First Amendment privilege, if such an immunity were to be recognized.

> Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that the liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher whose utilizes the latest photocomposition methods.

408 U.S. at 703.

It is one thing to suggest that the federal government may voluntarily restrain the exercise of its regulatory power to reduce tension between regulatory interests and First Amendment values by trying to distinguish between those engaged in bona fide expressive activity and those engaged in the business of investment advice. It is quite another matter to require—as a matter of constitutional law—that all individuals purporting to exercise their First Amendment rights have a special privilege against general regulatory statutes. Yet it is the broader *constitutionally*-based privilege that petitioners urge in the instant case.

To recognize the petitioners' expansive claims of privilege against the operation of federal and state securities regulation "would present practical and conceptual difficulties of a high order," *Branzburg*, 408 U.S. at 703, including the risk of gravely undermining the government's capacity to achieve its intended and substantial interest in "control-[ling] advisers and . . . prevent[ing] those who are not registered from giving investment advice." *S.E.C.* v. *Lowe*, 556 F.Supp. 1359, 1363 (S.D.N.Y. 1983).

IV

THE FEDERAL AND STATE GOVERNMENTS HAVE SUBSTANTIAL INTERESTS IN PRESERVING THE FREEDOM TO EXPERIMENT IN THE DEVELOPMENT OF DIFFERENT REGULATORY STRATEGIES AGAINST UNFAIR TRADE PRACTICES.

The persistent problems of unethical investment advice and other forms of securities fraud confront government with the familiar, but difficult task of dealing with unfair trade practices. After decades of effort, it is conventional wisdom that unfair or fraudulent business practices run the gamut of human ingenuity and chicanery. As a result, federal and state strategies must grow, evolve, and adapt to new schemes. To this end, federal and state officials have proposed a new policy statement for defining the high fiduciary duties to be imposed on investment advisers. NASAA, Proposed Statement of Policy, "Unethical Business Practices for Investment Advisory Firms," 1 Blue Sky L. Rep. (CCH), ¶ 5343 (1983) [set forth in Appendix B to this brief].

First Amendment doctrine should not be stretched to restrict state and federal capacity for regulating unfair trade practices. In this context, the famous observations of Justice Brandeis in his famous dissenting opinion in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 310-12 (1932) are pertinent to this case. Speaking about the application of "substantive due process" doctrine to state economic regulation in the Great Depression, Brandeis argued that he could not believe that the framers of the Fourteenth Amendment intended to deprive the states of the power to correct the abuses and evils of commerce:

There must be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . .

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment . . . . But in the exercise of this high power, we must be ever on guard, lest we erect our prejudices into legal principles.

This Court must not lose sight of the overriding fact that this case involves a traditional form of economic regulation—not political censorship. The concept of freedom of expression has little or nothing to do with the business of giving investment advice. Expressive liberty is essential for self-government in a democratic republic. However, it should not be used as camouflage for reinjecting into our Constitution the doctrines of laissez faire as restrictions on the legislative powers of the nation and the states.

> [I]n the world of political advocacy and its marketplace of ideas, there is no such thing as a 'fraudulent idea.' [The] free flow of information is important in this context not because it will lead to any objective "truth," but because it is essential to our system of self-government. The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available on request, reciting the Latin maxim 'caveat emptor.' . . . [I]n a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

Central Hudson Gas v. *Public Service Commission*, 447 U.S. 557, 598-99 (1980) (Rehnquist, J., dissenting).[4]

CONCLUSION

This case cannot be resolved by resort to mechanical tests or talismanic labels like "prior restraint" or "strict scrutiny." As in all cases involving the application of general regulatory statutes designed for purposes unrelated to censorship or suppression of free expression, judicial analyis must accommodate the public interest in preserving the legislatures' capacity to govern.

As Professor Bickel once noted, the First Amendment is "a series of compromises and accommodations." A.M. Bickel, *The Morality of Consent* 57 (1975). The application of general regulatory statutes to those who claim to be only expressing themselves is a particularly difficult occasion for precise rules and coherent theory. However, one basic principle in this "untidy accommodation" is that the press, and those who claim the benefits of the First Amendment, enjoy no special immunity from the laws generally applicable to everyone else. In this sense, the case at bar boils down to whether or not Mr. Lowe can continue to advise

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[4] Indeed, the petitioners' preference for court-ordered disclosure of Lowe's convictions to be published in the newsletters seems like "merely a statement . . . reciting . . . 'caveat emptor.' " *Id.*

the public on the value of securities merely because his current strategy and last resort for perpetuating his business is publication of newsletters.

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December, 1984

APPENDIX A

Pertinent Provisions of the Uniform Securies Act

SECTION 401(f). "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" does not include (1) a bank, savings institution, or trust company, (2) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession; (3) a broker-dealer whose performance of these services is solely incidental to the conduct of his business as a broker-dealer and who receives no special compensation for them; (4) a publisher of any bona fide newspaper, news magazine, or business or financial publication of general, regular, and paid circulation; (5) a person whose advice, analyses, or reports relate only to securities exempted by section 402(a)(1); (6) a person who has no place of business in this state if (A) his only clients in this state are other investment advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (B) during any period of twelve consecutive months he does not direct business communications into this state in any manner to more than five clients other than those specified in clause (A), whether or not he or any of the persons to whom the communications are directed is then present in this state; or (7) such other persons not within the intent of this paragraph as the [Administrator] may by rule or order designate.

SECTION 201(c). It is unlawful for any person to transact business in this state as an investment adviser unless (1) he is so registered under this act, (2) he is registered as a broker-dealer without the imposition of a condition under section 204(b)(5), or (3) his only clients in this state are investment companies as defined in the Investment Company Act of 1940 or insurance companies.

SECTION 204(a). The [Administrator] may by order deny, suspend, or revoke any registration if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser.

(A) has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(B) has willfully violated or willfully failed to comply with any provision of this act or a predecessor act or any rule or order under this act or a predecessor act;

(C) has been convicted, within the past ten years, of any misdemeanor involving a security or any aspect of the securities business, or any felony;

(D) is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business;

(E) is the subject of an order of the [Administrator] denying, suspending, or revoking registration as a broker-dealer, agent, or investment adviser;

(F) is the subject of an order entered within the past five years by the securities administrator of any other state or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer, agent, or investment adviser, or the substantial equivalent of those terms as defined in this act, or is the subject of an order of the Securities and Exchange Commission suspending or expelling him from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States Post Office fraud order; but (i) the [Administrator] may not institute a revocation or suspension proceeding under clause (F) more than one year from the date of the order relied on, and (ii) he may not enter an order under clause (F) on the basis of an order under another state act unless that order was based on facts which would currently constitute a ground for an order under this section;

(G) has engaged in dishonest or unethical practices in the securities business;

(H) is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the [Administrator] may not enter an order against a broker-dealer or investment adviser under this clause without a finding of insolvency as to the broker-dealer or investment adviser; or

(I) is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (b).

The [Administrator] may by order deny, suspend, or revoke any registration if he finds (1) that the order is in the public interest and (2) that the applicant or registrant

(J) has failed reasonably to supervise his agents if he is a broker-dealer or his employees if he is an investment adviser; or

(K) has failed to pay the proper filing fee; but the Administrator may enter only a denial order under this clause, and he shall vacate any such order when the deficiency has been corrected.

The [Administrator] may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next thirty days.

SECTION 408. Whenever it appears to the [Administrator] that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this act or any rule or order hereunder, he may in his discretion bring an action in the [insert name of appropriate court] to enjoin the acts or practices and to enforce compliance with this act or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court may not require the [Administrator] to post a bond.

APPENDIX B

Proposed Statement of Policy

UNETHICAL BUSINESS PRACTICES FOR INVESTMENT ADVISORY FIRMS

Public Comment Draft

North American Securities Administrators Association, Inc. The following are "unethical practices" by an investment adviser:

1. Recommending to a client the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser.

2. Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without first obtaining written discretionary authority from the client unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

3. Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources and character of the account.

4. Placing an order to purchase or sell a security for the account of a client without authority to do so.

5. Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained written third party trading authorization from the client.

6. Borrowing money or securities from, or lending money or securities to, an investment advisory client.

7. Representing itself as a financial or investment planner, consultant, or adviser, when the representation does not accurately also disclose the nature of the services offered, the qualifications of the person offering the services, and the method of compensation for the services.

8. Use [Using] in substantially the same form advisory material prepared by other persons without identifying the name of the author or publisher of such material.

9. Charging a client an unreasonable advisory fee.

10. Failing to disclose compensation arrangements in connection with advisory services to clients which are in addition to compensation from such clients for such services.

11. Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the firm and its employees which could reasonably be expected to impair the rendering of unbiased and objective advice.

12. Guaranteeing a client against loss in connection with advice which will be rendered.

13. Failing to maintain adequate safekeeping facilities for customer funds and securities.

14. Publishing, circulating, or distributing any advertisement which:

A. contains any untrue statement of a material fact, or which is otherwise false or misleading; or

B. refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser; or

C. refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person; provided, however, that this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately: (1) state the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price of each such security as of the most recent practicable date, and (2) contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body of text thereof: "it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or

D. represents, directly or indirectly, that any graph, chart, formula, or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his or her own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or

E. contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis, or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly.

For the purposes of this rule the term "advertisement" shall include any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any

security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to who should buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

15. Disclosing the identity, affairs, or investments of any client unless required by law to do so.

16. Charging a client both an advisory fee for rendering investment advice and a commission for executing securities transactions pursuant to such advice without disclosing in writing to the client full details regarding the conflict of interest that exists in acting in both capacities.

17. Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds, unless:

A. all such securities of each such client are segregated marked to identify the particular client who has the beneficial interest therein, and held in safekeeping in a place reasonably free from risk of destruction or other loss; and

B. all such funds of such clients are deposited in one or more bank accounts which contain only clients' funds; such account or accounts are maintained in the name of the investment adviser as agent or trustee for such clients; and the investment adviser maintains a separate record for each such account which shows the name and address of the bank where such account is maintained, the dates and amounts of deposits in and withdrawals from such account, and the exact amount of each client's beneficial interest in such account; and

C. such investment adviser, immediately after accepting custody or possession of such funds or securities from any client, notifies such client in writing of the place and

manner in which such funds and securities will be maintained, [and] thereafter, if and when there is any change in the place or manner in which such funds or securities are being maintained, gives each such client written notice thereof; and

D. such investment adviser sends to each client, not less frequently than once every three months, an itemized statement showing the funds and securities in the custody or possession of the investment adviser at the end of such period, and all debits, credits and transactions in such client's account during such period; and

E. all such funds and securities of clients are verified by actual examination at least once during each calendar year by an independent public accountant at a time which shall be chosen by such accountant without prior notice to the investment adviser. A certificate of such accountant stating that he or she has made an examination of such funds and securities, and describing the nature and extent of such examination, shall be filed with the Commissioner promptly after each such examination.

The conduct set forth above is not inclusive. Engaging in other conduct such as non-disclosure, incomplete disclosure, or deceptive practices shall be deemed an unethical business practice.